Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petition for Declaratory Ruling Contingent Petition for Preemption by Great Lakes Communication Corp. and Superior Telephone Cooperative	)	WC Docket No. 09-152

COMMENTS OF NORTHERN VALLEY COMMUNICATIONS, LLC AND SANCOM, INC. IN SUPPORT OF PETITION

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Northern Valley Communications, LLC ("Northern Valley") and Sancom, Inc. ("Sancom"), collectively the "Commenters," through counsel and pursuant to DA 09-1843,[1] file these comments in support of the Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption. The rulings that the Iowa Utilities Board ("Board") made in its "Decision Meeting" on August 14, 2009,[2] undoubtedly regard matters of interstate communications and should be declared unlawful or, in the alternative, preempted as an unlawful encroachment upon the Commission's exclusive interstate jurisdiction. At the very least, the Board's rulings render compliance with federal policy impossible for interexchange carriers ("IXCs") and contravene the Commission's long-standing procompetitive intent which are two errors that likewise warrant preemption. Moreover, as explained further herein, the Board's rulings encourage IXCs to engage in unlawful self help in the form of refusing to pay tariffed access charges without the permission of any tribunal. The Commission should take this opportunity to re-affirm its position that such conduct is not permitted.

SUMMARY

The Iowa Utilities Board has reached a decision in the Qwest complaint case, Docket FCU 07-2, that warrants preemption.[3] Several of the findings of fact and

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[1] WC Docket No. 09-152, *Comments Sought on Petition for Declaratory Ruling and Contingent Petition for Preemption of Great Lakes Communications Corp. and Superior Telephone Cooperative* (Aug. 20, 2009).

[2] Commenters append as **Exhibit 1** a transcript ("Tr.") of the August 14, 2009 IUB Decision Meeting that Qwest has filed in the lawsuits that each company has filed against Qwest. *Northern Valley Communications, LLC v. Qwest Communications Corporation*, Case No. 09-1004-CBK (D.S.D. July 30, 2008); *Sancom, Inc. v. Qwest Communications Corp.*, Case No. 07-4147-KES (D.S.D. Oct. 9, 2007).

[3] Commenters note that on September 16, 2009, Qwest filed a Motion to Suspend Comment Schedule purporting that the Board has not reached a reviewable decision. Petitioners Great Lakes and Superior filed an Opposition to that Motion the next day demonstrating that Qwest itself has relied upon the Board's decision before two federal district courts as being authority supporting its claims and defenses. In addition, on September 18, 2009, the Board released an Order Initiating Rulemaking, appended hereto as

conclusions of law in the Board's decision regard interstate communications which Congress placed under the exclusive jurisdiction of the Commission. Several other findings and conclusions directly contravene federal law such as the Commission's holdings in the *Farmers and Merchants* case.[4] And, perhaps most importantly, the Board rendered a liability finding that with certainty will work to the detriment of the clearly stated goals of Congress and the Commission to foster competition in the local telecommunications market and to encourage the deployment of broadband facilities in rural America. Each of these aspects of the Board's decision, which are addressed individually below, warrant preemption under well-settled jurisprudence, principally *Louisiana PSC*.[5]

I. THE BOARD'S DECISION CONTRAVENES THE JURISDICTIONAL LIMITS SET BY THE SUPREME COURT IN *ILLINOIS BELL* AND *LOUISIANA PSC*

The Board's rulings on August 14 regard matters that are plainly within the Commission's exclusive interstate jurisdiction. Indeed, the case itself was the first affirmative access charge case that Qwest filed, and plainly was intended to obtain *ex post facto* permission to cease paying all terminating access which was at least 95% interstate in nature.[6]

As the Petition explains, Congress endowed the Commission with exclusive jurisdiction over interstate communications. Petition at 4-5. Its intent is clear

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Exhibit 2, acting upon one of the decisions it articulated during the August 14 Decision Meeting: "that we start a rule making proceeding, and start it very quickly" regarding "volume access services." Tr. at 4.

4 *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001.

5 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

6 Docket FCU 07-2, Testimony of Joshua D. Nelson on Behalf of Great Lakes Communications at 9:4-11 (Sept. 15, 2008) (interstate amounts owed are 96.4% of all amounts owed); Testimony of Tom Mart on Behalf of Superior Telephone Cooperative at 9:14-23 (Sept. 15, 2008) (interstate amounts owed are 99.1% of all amounts owed).

in the unambiguous language of Sections 151 and 152 of the Communications Act of 1934. *Id.* (quoting 47 U.S.C. §§ 151, 152(a)).[7] Further, as the Petition also explains, Congress had articulated its position on the proper allocation of jurisdiction ever prior to the 1934 Act, in *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). *Id.* at 5. There, the Court stated that:

> [t]he separation of the intrastate and interstate property, revenues, and expenses of the company is important not simply as a theoretical allocation ... It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.

282 U.S. at 148.

Even where facilities located fully within one state are used in the provision of interstate communications, the Supreme Court held in *Louisiana PSC*, state action is nonetheless precluded in several instances. *See* Petition at 17-18. To paraphrase the Court, states may not act where

(1) Congress has expressed a "clear intent to pre-empt state law,"

(2) the state decision creates an "outright or actual conflict between federal and state law,"

(3) complying with both federal law and the new state decision is "physically impossible,"

(4) there is "implicit in federal law a barrier to state regulation,"

(5) a federal agency "occup[ies] an entire field of regulation," or

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7 The 1934 Act was established "for the purpose of regulating interstate and foreign commerce in communication by wire ... and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, ... 47 U.S.C. § 151. The Commission's jurisdiction extends to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; ... ." *Id.* § 152(a).

(6) the state action "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Louisiana PSC, 476 U.S. at 368-69.[8]

Almost all of the decisions announced by the Board on August 14 contravene at least one of these jurisprudential limits on state agency action. Commenters will address several of these decisions in detail and will explain why the Commission should grant the Petition and hold that the Board's decision unlawfully encroaches upon interstate jurisdiction.

A. The Board's Decision Directly Impacts the Terms, Conditions, and Revenues Arising from Interstate Communications

The Board reached several conclusions in resolving Qwest's purportedly state-based complaint against the Iowa LECs. These conclusions are quite plainly stated in the transcript of the August 14 "IUB Decision Meeting" which Qwest has filed in support of its claims and defenses in the federal lawsuit that Northern Valley filed against Qwest in the federal district court for the District of South Dakota. Exhibit 1.

The following conclusions plainly regard or directly impact interstate communications:

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[8] As the Supreme Court also has stated:

> When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land."

City of New York v FCC, 486 U.S. 57, 63 (1988) (quoting U.S. CONST., Art. VI, cl. 2) (reviewing regulation of cable industry).

Conference call and chat line service providers are not considered "End Users" under the terms of "Respondents' access tariffs." Transcript at 1-2.

The Board never identifies **which** of "Respondents' access tariffs" this ruling regards. This telling omission occurs in several of the Board's conclusions discussed herein. To insert the word "intrastate" into this statement would have been quite easy to do, and yet the Board did not. Thus we can conclude only that the Board is interpreting interstate access tariffs along with intrastate tariffs. As such, the Board is purporting to rule on what traffic is compensable under <u>interstate access tariffs</u> which is a matter solely within the Commission's jurisdiction under the 1934 Act. *E.g.*, 47 U.S.C. §§ 152(b), 203.[9] Access charges are a creature of the 1934 Act and are not, unlike some of the procompetitive provisions of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996), implemented via a dual jurisdictional regime shared between state agencies and the Commission. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384 (1999) ("It is the States that will apply those standards and implement that methodology"); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002) ("Congress directed the FCC to prescribe methods for state commissions to use in setting rates"). The Board has no need or right to opine on how interstate calls are provisioned or rated on a retail basis, and it likewise cannot rule on the imposition of terminating

[9] Section 203 states in pertinent part that

> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges.

Id. § 203(a).

access on those calls. *See Louisiana PSC*, 476 U.S. at 374 ("An agency may not confer power upon itself.").

This conclusion therefore should be preempted under the prong of *Louisiana PSC* that prohibits state agencies from acting on matters for which Congress has shown a "clear intent" to establish exclusive federal jurisdiction. 476 U.S. at 368.

The conference call and chat line service providers did not subscribe to the Respondents' services. Transcript at 1-2.

This conclusion is not limited to intrastate traffic, access tariffs, or revenues. As is evident in the conclusion discussed above, the Board includes interstate traffic in this conclusion and has held that no traffic to the Iowa LECs is compensable under the access regime. As such, the Board has imposed what should be only an intrastate Iowa ruling on all traffic that enters Iowa from anywhere in the country. This conclusion is expressly preempted by the 1934 Act. 47 U.S.C. § 152(b), 203(a); *see also Louisiana PSC*, 476 U.S. at 368.

Respondents did not bill for end user subscriber line charges or universal service charges. Transcript at 1.

This conclusion is wholly outside the Board's jurisdiction to reach. Iowa has no intrastate Universal Service contribution regime; this conclusion squarely regards 47 U.S.C. § 254 and the Commission's implementing rules. Only the Commission has the authority to implement and oversee contributions to the Universal Service Fund, and no state agency has the authority even to consider, let alone reach a legal conclusion about, any carrier's compliance with those obligations. *See Champion Int'l Corp. v. Brown*, 731 F.2d 1406, 1408-09 (9th Cir. 1984) (state agency "has no cognizable state interest in enforcing" federal employment law). The Commission therefore should hold that the Board is preempted from implementing or enforcing this conclusion, 476 U.S. at 368, and cannot rely upon it as grounds to deny any Iowa LEC the terminating access charges that it has tariffed and billed.

> The conference companies were not treated as end users but instead as joint business ventures. Transcript at 1.

In an item discussed in Section I.B. below, Commenters show that the Board decided that it can ignore the Commission's *Farmers and Merchants Order*.[10] Transcript at 1. This "joint venture" conclusion is an outgrowth of that improper decision. The Board has refused to recognize that the conference call and chat line companies which the Iowa LECs serve are "end users," despite the fact that their tariffs use the very same language and definitions on which the Commission relied in the *Farmers and Merchants Order* to hold that such entities ***are*** end users. 22 FCC Rcd. at 17987 ¶ 38. In addition, despite the Commission's holding in *Farmers* that those who "enter their name for service" are end users, regardless of the payment of marketing fees or commissions, *id.* at 17987-88 ¶ 38, the Board adopted Qwest's argument that the conference call and chat line companies are "partners" or are in a "joint venture" with the Iowa LECs. Having created this plain conflict between federal and state law, the Board again should be preempted. *Louisiana PSC*, 476 U.S. at 368.

> None of the international calls handled by the LECs were actually terminated in their exchanges and thus terminating access chargers should not have been accessed to these calls. Transcript at 2.

In this conclusion the Board purports to assume jurisdiction over international calls. This conclusion is particularly bothersome, because very early in the

[10] *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, FCC 07-175, 22 FCC Rcd. 17973 (2007).

case the Board stated that it "is aware of its jurisdictional limits with respect to interstate and international traffic, which is at issue in various proceedings before both the FCC and federal courts." Order Docketing Complaint, Setting Procedural Schedule, Denying Motion for Summary Judgment, Denying Motions to Dismiss, Denying Motion to Defer Discovery, and Denying Cross-Motion for Emergency Evidentiary Hearing at 12 (May 25, 2007). The Board then vowed to confine its review of Qwest's complaint to only "as it relates to intrastate traffic." *Id.* Yet in this item the Board nonetheless issued a conclusion as to whether international calls are compensable under the access regime. That conclusion is far outside the boundaries of state agency jurisdiction — international calling was squarely placed in the Commission's jurisdiction by Congress (47 U.S.C. § 152(a)) — and thus should be preempted. *Louisiana PSC*, 476 U.S. at 368.

Because the conference call and chat line service providers were never end users under the tariffs, the tariffs do not apply and thus the filed rate doctrine does not apply.

This conclusion, like several of those discussed above, does not distinguish between intrastate and interstate access tariffs. In fact, this conclusion does not even explain which kind of "tariffs" the Board is referencing. Yet the effect of this conclusion is to hold that none of the traffic received by the Iowa LECs is compensable, neither the intrastate nor the interstate traffic. The Board has no jurisdiction to decide that interstate traffic cannot be compensated for terminating access, however. Compensation for interstate wireline service is within the exclusive jurisdiction of the Commission. *E.g.*, 47 U.S.C. § 203(a).

> The traffic did not terminate at the end user's premises since the conference companies did not own or lease or otherwise control the premises where the conferencing equipment was installed.

Here again the Board failed to specify, as would have been easy to do, between intrastate and interstate traffic. As such, the Board has issued yet another conclusion to the effect that interstate traffic to the Iowa LECs is not compensable under the access regime. Questions regarding interstate access, including when it applies, are within the sole jurisdiction of the Commission to decide. *E.g.*, 47 U.S.C. § 203. The Board should thus be preempted on this matter. *Louisiana PSC*, 476 U.S. at 368.

> A rulemaking proceeding should be enacted to amend the IUB's rules in the manner of 47 U.S.C. § 223 to restrict access by minors to obscene calling services. Transcript at 5.

This conclusion demonstrates that the Board is going to restrict how end users place long-distance calls to content providers. Such restrictions would directly and negatively affect interstate communications. It should be noted, moreover, that the content in Iowa was accessed via long-distance and/or 1-800 calls, and yet 47 U.S.C. § 223 by its express language applies only to pay-per-call services such as 1-900 services. The Board's intent to use 47 U.S.C. § 223 as a model is misplaced. Thus, not only is the Board usurping the Commission's authority over interstate calls, but its method is ill-conceived and misapplies a federal statute. These errors each warrant preemption as being both contrary to Congress's intent to bar states from regulating interstate communications and as being in conflict with existing federal law. *Louisiana PSC*, 476 U.S. at 368-69.

In addition, the Board's intent to regulate access to certain content purports to regulate content providers, not telecommunications services providers.

Whereas pay-per-call services are common carriers employing toll phone numbers, in Iowa the content providers are simply end users of LEC local exchange service. The Board rules contemplated in the Decision Meeting would of necessity reach past the LECs to regulate the non-common carrier content providers. The Board's decision is thus an improper *ultra vires* action for this additional reason.

The IUB "should refer" to the FCC the question whether Great Lakes and Aventure properly rely on the Commission's rural exemption in the *Access Charge Seventh Report and Order*. The "evidence in the record would support a finding that Great Lakes failed to satisfy the requirements" of the rural exemption. Transcript at 6.

In this conclusion, the Board, after noting that "[o]ur jurisdiction in that matter is limited to intrastate access charges," nonetheless issues a ruling about interstate access rates and the rural exemption. The Commission created the rural exemption in 2001, *Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-98, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9951-53 ¶¶ 67-73 (2001), and even the Board knows that only the Commission can review its application. Transcript at 6. Yet the Board persisted in announcing its conclusion that Great Lakes does not qualify for the rural exemption. It had no right to do so.

The Board's pronouncement that it will "refer" this matter to the Commission is equally improper. That which a State cannot do it likewise cannot direct a federal agency to do.[11] In Commenters' experience, this statement by the Board is

[11] The Commission may assume authority to conduct or complete an interconnection arbitration by the express language of 47 U.S.C. § 252(e) which provides for such authority "[i]f a State commission fails to act to carry out its responsibility" to do so. *E.g., Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 15 FCC Rcd. 11277 (2000). The

unprecedented; there is no such thing as a primary jurisdiction referral by a state agency to a federal one. Moreover, it was made clear during the public sessions of the hearing in this case that Qwest, AT&T, or Sprint could have filed a petition at the Commission to challenge any LEC's reliance on the rural exemption. Not one IXC had an answer as to why no such petition was filed. With the IXCs so loathe to seek the Commission's determination of a matter so clearly within its exclusive jurisdiction, it is curious that the Board insists on seeking a determination on the IXCs' behalf. The Board should not be permitted to perform this "referral," and the Commission should hold that the Board's findings and conclusions regarding the rural exemption are all unlawful *ultra vires* state action.

The Board will "commence reclamation of some of the numbers assigned to Great Lakes, which has no end users." Transcript at 6.

No state agency has the jurisdiction to give or to take away numbers. In 2001, the FCC held that "only the Commission, specifically the Common Carrier Bureau and the Enforcement Bureau, shall direct the NANPA or National Pooling Administrator to withhold numbering resources from carriers for audit-related violations." *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-262 and CC Docket No. 99-200, 17 FCC Rcd 252, 295 ¶ 97 (2001). The Commission considered but did not delegate numbering authority to state commissions. The Iowa Board thus has no jurisdiction to "reclaim" any numbers from Great Lakes.

situation here is the polar opposite: a State Commission purports to instruct the Commission that it should investigate a LEC's reliance on federal law.

The Iowa LECs must "refund the illegally collected access charges." Transcript at 3.

This statement purports to impose liability on the eight Iowa LECs, and yet again the Board fails to distinguish between intrastate and interstate revenue. As demonstrated above, more than 95% of the terminating access billed by Great Lakes and Superior arose from interstate traffic. *See infra* n.6. The Board's failure yet again to specify that only intrastate revenue must be refunded leads one to reasonable conclusion that all terminating access revenue is to be returned. As such, the Board has stepped unlawfully into the Commission's clear exclusive authority over interstate matters. *E.g.*, 47 U.S.C. § 203(a). This action also warrants preemption. Louisiana PSC, 476 U.S. at 368.

In addition to being a flagrant *ultra vires* action, the Board's liability finding also conflicts with the long-standing Congressional and Commission policy in favor of competition. *See* Petition at 19-20. This decision would, if upheld, deprive the Iowa LECs of millions of dollars in revenue. As Petitioners Great Lakes and Superior explained to the Board in their Motion to Stay Proceedings, this result could cause LECs to exit the Iowa market; the refund order "threatens the very existence of" their businesses. Docket FCU 07-2, Motion to Stay Proceedings at 7 (Aug. 17, 2009). Forcing carriers out of business is inimical to Congress's intent to achieve competition in the local telecommunications market, as well as to the Telecommunications Act of 1996 generally. *E.g.*, H.R. Rep. No. 104-204, 104^{th} Cong. 1^{st} Sess. at 89 ("the purpose of this legislation is to shift monopoly markets to competition as quickly as possible"). In addition, one court of appeals has held that "[c]ompetition and de-regulation are valid federal interests the FCC may protect through preemption of state regulation." *Minnesota Pub. Utis.*

Comm'n v. FCC, 483 F.3d 570, 580 (8^{th} Cir. 2007) (citing *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982)).

Where a state decision so plainly is an "obstacle to the accomplishment and execution of the full objectives of Congress," it shall be preempted. *Louisiana PSC*, 476 U.S. at 369. The Board's liability finding therefore warrants preemption by the Commission.

The Board's decision also impedes the goal of Congress and of the Commission to achieve widespread broadband deployment in rural areas. This goal has been at the forefront of telecommunications policy for over a decade. Section 706 of the 1996 Act, 47 U.S.C. § 157 nt, requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans[.]" *Id.* § 157(a) nt. Congress further displayed its commitment to broadband by appropriating billions of dollars for broadband deployment in the American Recovery and Reinvestment Act of 2008; both NTIA and the Rural Utilities Service of the USDA are reviewing applications for ARRA grants as we speak.

The Commission has issued five reports pursuant to Section 706, and commenced its sixth inquiry on August 7, 2009.[12] Chairman Genachowski dedicated the new FCC Video Blog to discussing the importance of broadband to the nation's future,[13]

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[12] GN Docket No. 09-137, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Notice of Inquiry, FCC 09-65 (rel. Aug. 7, 2009) (initial comments were due September 4, 2009; reply comments due October 2, 2009).

[13] *Available at* <http://blog.broadband.gov>.

and broadband deployment has been a featured topic in the public comments of Commissioner's.[14]

Forcing the Iowa LECs to refund millions of dollars in access revenue — money that they intended to use for purchasing and deployment high-capacity transmission facilities in Iowa[15] — is directly contrary to Congress's and the Commission's broadband goals. As such this liability finding warrants preemption not only as an encroachment on the Commission's exclusive jurisdiction as expressly granted by Congress, 476 U.S. at 368, but only because of the impedance it will be to furthering clearly stated federal goals. *Id.* at 369.

B. The Board's Decision Cannot Be Implemented Consistent with Federal Law and Policy

The Board also reached several conclusions that either contravene federal law or render it impossible for the LECs to comply with state and federal law simultaneously. These conclusions are:

> The Commission's decision in *Jefferson Telephone* does not preclude the IUB from addressing the issues because that case did not directly address the tariff issues relevant to in the case at bar. Transcript at 1.

In this holding, the Board is refusing to follow federal law. The Commission held in *Jefferson Telephone*[16] that the sharing of access revenues does not

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[14] Incentives Matter: Decision Making at the FCC, Speech by Commissioner Meredith A. Baker, Free State Foundation (Sept. 10, 2009), *available at* < http://www.fcc.gov/commissioners/baker/speeches2009.html>.

[15] *E.g.*, Docket FCU 07-2, Testimony of Ronald Laudner, Farmers Telephone Company of Riceville, Iowa at 17:8-12 (Sept. 15, 2008) ("we used it for the build-out of broadband and fiber networks into not only our rural serving areas, but the underserved rural areas of Qwest and Iowa Telecom"); Testimony of Rex McGuire, The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa at 13:11-17 (Sept. 15, 2008) (access revenue is being used to deploy "CATV facilities with a fiber optic cable to the home network" which will enable company "to provide broadband Internet access, digital cable TV and innovative new services").

[16] *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001).

violate 47 U.S.C. § 202(a) as AT&T had alleged. 16 FCC Rcd. at 16133 ¶ 5. Though the Board initially stated that it would review *Jefferson Telephone* as it regards revenue sharing, Transcript at 1, in fact the Board never mentions that case in its discussion of revenue sharing. And its decision on this issue directly contravenes *Jefferson Telephone*. *See infra* at 19. As such, the Board has ignored controlling federal precedent which it is not permitted to do.

> The FCC's *Farmers and Merchants Order* is not a final decision and that any findings of fact or law from the FCC decision are not determinative. Transcript at 1.

In this conclusion, the Board presumes here to decide upon the finality of Commission decisions, and then further presumes to ignore a Commission order entirely. State agencies are required, however, to give deference to orders from federal agencies that regard the subject matter in the state proceeding. As the federal court of appeals for the D.C. Circuit has stated, "Congress has clearly charged the FCC, and not the State commissions, with deciding" matters related to interstate telecommunications service — in that case, petitions for permission to provide interLATA service. *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-417 (D.C. Cir. 1998).

> The IUB has a more complete record in this case than the FCC had in *Farmers and Merchants*. The Commission should note, however, that the IUB did not have access to the full record in that case which is in large part sealed by protective order.

This holding, like the previous one, purports to portray the Board as the more well-equipped tribunal for resolving the *Farmers and Merchants* case. It is all the more curious when one considers that no member or staffperson from the Board had access to the full record of that case, because of the protective order in place at the

Commission. Rather, the Board received documents as "evidence" from Qwest counsel during the hearing — those documents were also in the Farmers and Merchants record. As such, the Board was simply incorrect in supposing that its record was more complete than the Commission's. More pertinent to the jurisdictional issues in the Petition, however, is that this state agency has presumed to characterize the evidentiary adequacy of a federal agency order. Worse yet, this state agency refused to follow the federal order.

So-called "profit sharing," is unreasonable in this case because the LECs "ha[ve] substantial market power perhaps even monopoly power." Transcript at 4.

With this conclusion, the Board has held that revenue sharing of terminating access payments is unlawful. For, as the Board surely is aware, in the *Access Charge Seventh Report and Order* the Commission found that CLECs have monopoly control over their end users' local loop, and on that basis found it appropriate to establish the benchmark mechanism for access rates. Thus, in stating that it is unreasonable for a LEC to share access revenues when they have "substantial market power perhaps even monopoly power," the Board has outlawed revenue sharing of terminating access. It will again purport to address this conduct in the rulemaking that it already has commenced, *see* Exhibit 2, which will include the question whether LECs may share access revenue with any entity.

This conclusion directly contravenes the Commission's express holding to the contrary in the *Farmers and Merchants Order*. There, the Commission was presented and dealt directly with evidence that the LEC was sharing terminating access revenues with its conference call provider customers. The Commission expressly held that

"Farmers' payment of marketing fees to the conference calling companies does not affect their status as end users, for purposes of Farmers' tariff. 22 FCC Rcd. at 17987-88 ¶ 38.

This conclusion also contravenes the Commission's holding in *Jefferson Telephone* that the sharing of access revenue is not a violation of 47 U.S.C. § 202(a). 16 FCC Rcd. at 16133 ¶ 5. In fact, it appears that the Board never even reviewed Jefferson Telephone on this issue. *See supra* at 16-17.

The Board has negated both of these Commission orders for every LEC in Iowa and for all calling traffic that terminates in Iowa. This holding therefore "actual conflict between federal and state law" and should be preempted. *Louisiana PSC*, 476 U.S. at 368.

II. THE IUB'S DECISION EXONERATES IXCs FOR THEIR UNLAWFUL REFUSAL TO PAY TARIFFED TERMINATING ACCESS CHARGES

Having thus gone much too far in terms of regulating interstate communications, the Board then made the additional error of not going far enough with regard to IXC self-help refusals to pay. In an incredible example of rear-view mirror, *post hoc* rationalization, the Board held that although "unilaterally withholding payment is not a preferred form of self-help (Tr. at 6)," a statement that itself is objectionable, here the IXCs in the end were correct in their access charge analysis and thus "there is no need for any sanction" for the IXCs' 2006 decision to stop paying terminating access. Tr. at 7. This holding directly contravenes federal law, and moreover on its face applies to both intrastate and interstate access revenue which again flouts the Board's jurisdictional limitations.

According to public records in Docket FCU 07-2, it is undisputed in the IUB case that Qwest, AT&T, and Sprint began withholding terminating access payments to several

Iowa LECs in approximately 2006. The IXCs' withholding of access payments contravenes well-settled Commission precedent. In 1992, the FCC refused to permit a reseller to avoid paying disputed fees to AT&T, stating that:

> The Commission previously has stated that **a customer**, even a competitor, **is not entitled to the self-help measure of withholding payment for tariffed services** duly performed **but should first pay**, under protest, the amount allegedly due **and then seek redress** if such amount was not proper under the carrier's applicable tariffed charges and regulations.

Business WATS, Inc. v. American Tel. & Tel. Co., 7 FCC Rcd. 7942 ¶ 2 (1992) (emphasis added).

In 1999, the Common Carrier Bureau held, in a dispute between MGC Communications and AT&T regarding originating access, that "AT&T's refusal to pay for the originating access that it has received since August 22, 1998, amounts to impermissible self-help and a violation of section 201(b) of the [Communications] Act." *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 11647, 11659 ¶ 27 (Com. Car. Bur. 1999).[17] On the basis of these conclusions, the Bureau ordered AT&T to pay MGC $1,966,240.07 plus interest[18] which represented amounts accrued in originating access charges between August 22, 1998, and July 16, 1999. *Id.*

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[17] The Bureau also held that AT&T "failed to take certain steps that would have been reasonable and necessary if it had wished to terminate its access service arrangement with MGC." *Id.* at 11655 ¶ 16. As such, AT&T "did, in fact, continue willingly accepting MGC's access service, as the record reflects, for the convenience of AT&T's customers, and, we conclude, for the business advantage that AT&T received therefrom." *Id.* at 11659 ¶ 26. To reiterate, in that case it was MGC originating access that AT&T willingly accepted in order that its long-distance retail customers could place interexchange calls. Similarly, in the Iowa case, the IXCs continued to send traffic to the Iowa LECs, often in order that their own long-distance retail customers could phone conference bridges and chat lines, and the question whether the usage was "willing" never was raised or adjudicated.

[18] Interest was to be calculated "at the rate published by the United States Internal Revenue service for tax refunds." *Id.*

The full Commission affirmed the liability finding of the Bureau. *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 308, 312 ¶ 13 (1999). The Commission stated that "we adopt the reasoning of the Bureau Order," and noted that "AT&T simply declined to pay the validly tariffed rate for the service that it continued to receive." *Id.* at 310 ¶ 6. The Commission altered the Bureau's decision in only one respect, holding that the imposition of interest calculated at the IRS on top of the already-tariffed 1.5% late fees was inappropriate. The interest penalty was thus reversed, but the tariffed late fee stood. *Id.* at 312 ¶¶ 12-13.

Again in 1999 the Common Carrier Bureau made clear that self-help in the form of refusal to pay invoiced charges was unlawful. *Bell Atlantic-Delaware, et al. v. Frontier Communications, et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 16050 (Com. Car. Bur. 1999). In that case, Bell Atlantic and other Bell Operating Companies brought a formal complaint against Frontier Communications for its refusal to pay invoiced payment service provider ("PSP") compensation. These carriers had provided documentation to Frontier that demonstrated their entitlement to PSP compensation, as well invoices. Frontier lodged the "affirmative defense" that it had no obligation to pay PSP compensation until it was satisfied that each BOC had satisfied the Commission's eligibility rules. The Bureau disagreed, holding that Frontier should have paid the invoices and then, were there any question of compliance, filed an enforcement action at the Commission. 14 FCC Rcd. at 16068 ¶ 27.

The Commission affirmed this rejection of self-help in 2000. *Bell Atlantic-Delaware, et al. v. Frontier Communications, et al.*, Memorandum Opinion and Order, 15 FCC Rcd. 7475 (2000). The Commission agreed that its "affirmative defense" regarding eligibility notwithstanding, this "so-called 'affirmative defense' is irrelevant to evaluating Frontier's obligation to pay upon receiving certification from Bell Atlantic. *Id.* at 7479 ¶ 9. It further stated that "the Commission looks disfavorably on such self-help," and in fact requested that the Enforcement Bureau get involved to consider whether to impose fines or other sanctions for Frontier's unilateral refusal to pay. *Id.* at 7480 ¶ 11.

The Commission again denounced self-help in 2001 expressly in the context of IXCs' refusal to pay terminating access to CLECs. In relating the positions of the IXCs with regard to CLEC access charges, the Commission noted that "[t]he IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services." *Access Charge Seventh Report and Order*, 16 FCC Rcd. at 9932 ¶ 23. The FCC stated that "[w]e see these developments as problematic for a variety of reasons." *Id.* Specifically, the FCC stated "[w]e are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system." *Id.* Though the FCC did address the IXCs' concerns regarding CLEC access rates — principally by establishing a benchmark system — the FCC refused to find that the IXCs were at all justified in simply withholding payment.

In the face of this consistent precedent, it is alarming that in Iowa the IXCs engaged in self-help refusal to pay terminating access on both intrastate and interstate call traffic for a matter of years. It is even more alarming that the Board ignored the Commission's precedent and held, three years after the fact, that "no money is owed by Qwest to the Respondents and there is no need for any sanction." Tr. at 7. This decision plainly covers both intrastate access charges, which are a small fraction of the traffic at issue in Iowa, and interstate access charges that are within the exclusive jurisdiction of the Commission to review, regulate, and adjudicate disputes of. Here again the IUB has flouted the Commission's jurisdiction and ignored its instruction.

Self-help refusal to pay is also and equally injurious to the Commission's longtime express goals of bolstering broadband deployment. *See* Section I.B., *supra.* The IXCs' choking off of tariffed access charges for traffic they concededly transmitted is significantly impeding the ability of LECs to invest in high-capacity facilities. As explained in Section I.B. above, this result plainly "stands as an obstacle" to accomplishing Congress's long-standing goal of furthering and encouraging broadband deployment. *E.g.*, 1996 Act, § 706, *codified at* 47 U.S.C. § 157 nt; *Minnesota PUC*, 483 F.3d at 580.

CONCLUSION

For all these reasons, the Commission should grant the Petition.

Dated: September 21, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 21st day of September, 2009, the foregoing Northern Valley Communications, LLC and Sancom, Inc. Comments in Support of Petition to be served on the following persons via ECFS, First Class Mail *, or electronic mail **:

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EXHIBIT 1

Transcript from August 14, 2009
IUB Decision Meeting

AUGUST 14, 2009 IUB DECISION MEETING

Can you tell ___ that Court is back in open session for a decision meeting that I, I if I am not mistaken, I think an outline was handed out earlier on to the public on the issues that we were dealing with in our closed session this morning. So at this point, the Board will address each one of these issues separately and I think Commissioner Tanner is going to start out with tariff issues.

BOARD MEMBER TANNER: The first issue is: Did the Respondents violate the terms of their access tariffs when they charged Qwest, Sprint, and AT&T terminating switched access fees for the traffic at issue in this case? The first sub-issue related to this is the question: Were the Free Conference Calling Service Companies Considered "End Users" as defined by the Respondents' Tariffs? The Access Tariff provisions require that calls be terminated to an End User who has subscribed to the tariff before access charges can be assessed from calls to that end user. Before I go into detail on the findings of fact I want to note for the record that we had discussed whether certain cases precluded us from even addressing this issue, the Jefferson Telephone case. It is my opinion that Jefferson Telephone does not preclude us from addressing this issue because it did not directly address these tariff issues; instead, it was a broader issue regarding revenue sharing. Again, the FCC proceeding, Farmers & Merchants, I do not consider final decision at this point and any findings of fact or law based on that record one are not yet final and two I think that this Board has a more complete record than what was before the FCC. So I just wanted to get that out of the way. Based on the record, the conference companies did not subscribe to the Respondents' services. In particular, the Respondents did not bill the conferencing companies for service. The net billing argument is not supported by the evidence. There are no accounting records to support it. Respondents did not bill for end user subscriber line charges or universal service charges. There were no monthly billings for ISDN service or any of the other evidence that one would expect to see if net billing had ___ been in place. ____________the Respondents offer amended agreements and back dated bills was unpersuasive. There is no evidence that those amendments reflected the original intent of the parties. Instead it was described by the conference calling companies as an attempt to change the deal. And in fact, you know, rather than being persuasive evidence, it raises a real concern that some of the parties may have been attempting to manufacture evidence after the fact in an attempt to create a false impression of the situation. Instead of treating the conference companies like end users, the Respondents shared profits with them and acted like they were in a joint business venture _____. Though profit sharing is not determinative of this matter, it simply shows no evidence they were netting the conference companies monthly bills against the shared profit. Finally, the Respondents also argue that filed tariff doctrine should allow them to go back and apply the tariff terms to the conferencing companies. But I believe that argument misses the point. These conference companies were never end users under the tariff, the tariff does not apply in these circumstances, so the filed tariff doctrine does not apply. For all of these reasons,

EXHIBIT
tabbies
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I find that the conference companies were not subscribing end users within the meaning of the term as it is used in the Respondents' access tariffs. That is my finding.

?: I agree.

BOARD MEMBER TANNER: The next sub-issue is did the toll traffic at issue in this case terminate at an end user's premises? The access tariff provisions require that the calls be terminated at the end user premises before access charges can be assessed from the relevant calls (28:02). It is my proposed finding that here the conference companies did not own or lease or otherwise control the premises where the conferencing equipment was installed, supporting the finding that calls are not being terminated at the end user premises. The Respondents make two main arguments in response. First they make the same net billing argument that was just rejected above. That is the lease payments for the space were netted out and the payments from the Respondents to the conferencing companies. Again there is no evidence to support that argument. _______payments reflecting that, no accounting records to support it, no monthly billings, and the conferencing companies did not control the space that was supposed to have been leased to them. The Respondents also point out that conference companies typically own the actual conference call bridges and some other equipment. This argument misses the point. The issue is whether the Respondents own or control the premises and there is no evidence that they did. For those reasons I conclude the traffic was not terminated at the end users premises in a manner that satisfies the requirements of the Respondents' access services tariffs. 26:48

?: I agree with the facts you cited in your reasoning and also _____ and I concur.

BOARD MEMBER TANNER: Another issue related to the tariff issue is did the toll traffic at issue in this case terminate within the Respondents' Certificated Local Exchange area? Under the relevant tariff provisions terminating access charges can only be assessed for calls that terminate in the LEC's local exchange area. This is an issue that does not equally affect all Respondents and the facts vary from one company to another. The first variation here involved international calling parties ~*coughing*~ and involved 5 of the 8 Respondents. A proper end to end analysis as set forth by the FCC of these calls supports a finding that none of these calls were actually terminated in the Respondent exchanges, thus terminating access charges should not have been assessed to these calls. The secondary issue involved the situation in which a Respondent billed terminating access charge as if the calls were terminated in a different exchange. This variation affects 3 of the 8 Respondents. Two of them attempted to justify the practice by claiming that it was foreign exchange service. That claim is totally unsupported by the facts. The conferencing companies did not order or pay for FX service and the calls are never actually transmitted to the alleged foreign exchange. There really was no valid argument for what these carriers did; it appears they were simply trying to maximize the access charges that they were applying to the ~*coughing*~ by actually moving the equipment to the other exchange. The third variation involves 2 Respondents, Great Lakes & Superior, which claim to terminate calls in exchanges where they do not have a certificate to provide local exchange service. Great Lakes is certificated to provide service in Lake Park and Milford and these telephone numbers assigned to those exchanges to provide conference calling bridging in Spencer where it is not certificated (24:35). Superior's Articles of Incorporation limit it to providing local exchange service in Superior, but it also provided conference bridging in Spencer. The valid arguments were offered to try to justify the application of access charges to this traffic. In each of these situations I conclude that the ____ (24:07) traffic was not terminated in the respective Respondents certificated local exchange area and access charges could not be applied on those calls (23:58).

?: Yeah, I agree with your factual analysis _____ and concur also.

BOARD MEMBER TANNER: And I will editorialize on that last piece that was a tariff discussion but you know, I find, I know we're going to talk about public policy issues but I find the application that the arrangements where terminating access was applied to international calls (23:22) or access charges terminating in a applied to an exchange, foreign exchange, that the calls did not even terminated to be particularly egregious and I know we'll discuss public policy issues, whether these sorts of issues or arrangements should go forward in the future but I was particularly disappointed to see these arrangements were _______ (22:51). So, in conclusion, back to the tariff issue, for all the reasons we have discussed, the Board will direct *~coughing~* (22:41) to draft an order for the Board's consideration that finds that the conferencing companies were not end users for purposes of the Respondents' exchange access tariffs; therefore, access charges did not apply to these calls and should not have been charged to the Interexchange Carriers. The Order should order the Respondents to refund the illegally collected access charges to the Petitioner and Interveners. Because the precise amount of the appropriate funds (22:16) is not entirely clear on the record, the Board, in its order, should ask Qwest, AT&T, and Sprint to file their calculations of the amount of the illegal access charges they were billed by and paid to the Respondents. If they need additional discovery from the Respondents to make this calculation they should be authorized to conduct that discovery.

?: Thank you, Board Member Tanner. Anything else you want to discuss _____ (21:49) policy issues?

BOARD MEMBER HANSEN: Well, first I ___ agree with the, everything that ___(21:38) the order that's the logical _______ (21:33). The public policy issues really relate to what we should consider in terms of future policy. And there are some ____ (21:20) that are grounded in the events that have already happened. These really are _____ (21:07) issues. The first one is the question of whether the sharing of access revenues between the Respondents and a free calling service company whether that's an unreasonable and discriminatory practice. The Petitioners ask that we find the revenue sharing arrangement was unreasonable and discriminatory. Well, with the record in this case, I don't think we can find that revenue sharing on its face is inherently unreasonable. It may be a warning or red flag indicating that something unreasonable is occurring, but there certainly could be situations where revenue sharing might be a valid business arrangement. For example, the access rates are intended to be set at the level that are intended to recover the costs of access services and the carrier's willingness to share a substantial portion of its access revenue with a conferencing company may be evidence that the carrier's access rates are in fact too high. But, I think we need to emphasize that this is not an indictment of access charges in general. This is a separate issue. And our, my concern anyway is that in these particular instances we have three important considerations. First of all, a carrier's access rates are set based upon a relatively low historical volume of access services (19:43). A second, the current and future volume of those services becomes much, much greater (19:39). And third, the carrier has substantial market power perhaps even monopoly power, over those services. In those particular situations, which I believe we find in this case, I believe that a sharing of those revenues is unreasonable. Now, I think we should also emphasize that if we find, we all agree that this was an unreasonable result, that finding would not be a reason to order refunds or retrospective relief because that decision has to be based on the tariff issues we have already discussed. It would just be a basis for addressing the situation in a forward going future-looking basis. So, I did find that in this particular case the arrangements were unreasonable. We were asked to find also if they are unreasonable and discriminatory. On the question of whether these were discriminatory arrangements, I personally did not find them to be discriminatory, but maybe not for the reasons that the Respondents would have preferred. Because I did not consider the conferencing companies to be end users, I don't think the sharing of access revenues was discriminatory, although it might have been unreasonable. However, ironically, if Respondents had prevailed on their claims that the free conferencing companies were end users, I would have very likely found that sharing the access revenues would have been discriminatory unless all or similar potential customers could have entered into the same agreements _________ (17:59). But, based on the finding that ____ this is an unreasonable arrangement in this particular case, I would like the order to direct that that we start a rule making proceeding, and start it very quickly. To consider amendments to our rules that are _____ (17:32) unreasonable _______ similar situations.

?: I agree with your analysis that you recommended just wanting to go back and ____ (17:20) emphasize the points you made and that's that this is not in any way an indictment of the access charges in general and that it is specific to this situation _______ (17:09).

BOARD MEMBER TANNER: I agree with that. The rule making that we envision has had volume access services and that that rule making will proceed independently and any other open issues we have regarding the CCL ? (16:50) order or any other _____(16:48) access charges. It's important that *~coughing~* that _____ (16:38) have a fair hearing and analysis of that issue separate from this and so this will make ______ (16:28) high volume services require the lower _____ than high volume. I would also note that it is our expectation that that we're making the

_____ (16:11) if not simultaneously, then within a week or so of this order, of the final order in this case. This is not going to be a situation where some time goes by before we initiate this rule making I think and I agree with the issues as laid out by Board Member Hansen. And I agree that it's not the sharing of revenues that troubles me it's that we have, when you get to the part ___ (15:38) what troubles me about this is that it's the high volume access, getting the access rates, that were supposed to be for low volume minutes, and so that I think is a _____ (15:21) issue, and that's what has to be ____ (15:18).

BOARD MEMBER HANSEN: The next public policy issue to consider is whether the Board should restrict conferencing services that promote pornographic or adult content on lines that can't be blocked by the end user. Qwest (15:03) us to restrict conferencing services that promote obscene content which can't be blocked. I can't emphasize enough that the Board should not, will not, and does not want to, regulate the content of telephone calls. However, the agency does have the authority to regulate access by minors to obscene calling services. Particularly, to protect and to promote the ability of parents to control that access by their own children. So, with that in mind, I think the Board should direct General Counsel to prepare an order for the Board's consideration that initiates rule making proceeding that will amend the Board's rules modeled on 47 U.S.C. §223 to restrict access to obscene calling, to allow access to be restricted in the case of obscene calling services.

?: I agree respectfully.

BOARD MEMBER TANNER: I agree as well.

BOARD MEMBER HANSEN: The next public policy issue is whether the Board should address Aventure's Federal Universal Service Fund support. Qwest and AT&T have asked the Board to take action against what they describe as Aventure's misuse of Federal Universal Service Funds support. The record in this case does indicate Aventure is alone among the Respondents in reporting conference cal ling lines for USF purposes. And in particular ____(13:35) includes test lines in its report and also appears to have overstated a number of exchanges ____ (13:29). However, the administration of the Federal USF is not our responsibility, not our jurisdiction. So I think we should report this information to the FCC for any further action as the FCC finds to be appropriate.

?: I agree respectfully.

BOARD MEMBER TANNER: I agree as well.

BOARD MEMBER HANSEN: Next one is if the Board should address the use of telephone numbering resources for Free Calling Service Companies. The evidence on the record indicates that some of the Respondents have received telephone numbers for exchanges in which they are not certificated to provide service and others may have blocks of telephone numbers that are not being used to provide service. I think there is sufficient evidence in the record to require ______ (12:44) to commence reclamation of some of the numbers assigned to Great Lakes, which has no end users. The other 7 Respondents should be required in our final order to file reports with the Board within 10 days of that order establishing whether they have any numbering blocks ____ no end users assigned.

?: _____ (12:20) recommendations.

BOARD MEMBER HANSEN: Then we have the issue of rural exemptions. The question is should the Board make a declaratory finding regarding the rural exemptions claimed by Aventure Communication Technology, LLC, and Great Lakes Communication Corp. Qwest has asked the Board to make a finding pertaining to the federal rural exemptions claimed by those companies. The rural exemption provisions that Qwest refers to relate to interstate access charges. Our jurisdiction in that matter is limited to intrastate access charges. So, no finding on this matter is appropriate; however, I think we should refer the issue to the FCC because the evidence in our record would support a finding that Great Lakes failed to satisfy the requirements for the rural exemption in its claim. The evidence with respect to Aventure is not so clear and does not appear to support such a claim.

?: I agree respectfully.

BOARD MEMBER TANNER: I agree as well.

BOARD MEMBER HANSEN: And the last issue to discuss under forward looking public policy is ___ (11:01) the evidence in this record establishes that Great Lakes and Aventure have few, if any, customers and that they have provided services and exchanges that are not covered by their certificates. So, I think the Board should direct the General Counsel to prepare orders for our consideration that will require those carriers to appear before the Board and show cause whether certificates of public convenience and necessity that are issued pursuant to Iowa code Chapter 476.29 should not be revoked.

?: Yeah, I agree with the recommendation.

BOARD MEMBER TANNER: I agree as well.

?: The last major area we have dealt with today concerns counterclaims. And in this docket the first one concerns whether Qwest and Sprint engage in unlawful self-help by refusing to pay tariffed charges for switched access. There are two forms of self-help at issue here. The first is Qwest action withholding payment of disputed access charges. I recommend here that the Board should find that unilaterally withholding payment is not a preferred form of self-help in these types of economic schemes ? unless a tariff ____(9:41) agreement provides withholding disputed amounts as part of ______ (9:37); however, based upon the rulings that have already been made, no money is owed by Qwest to the Respondents and there is no need for any sanction ____ (9:27). The second form of alleged illegal self-help involves claims that Qwest participated in call blocking and routed calls to other (9:18) and that Sprint deliberately chocked the traffic by moving conference traffic to _____(9:13) trunks. There is no credible evidence to support allegations that Qwest blocked calls. It is possible the calls were undelivered after Qwest ceased delivering calls and _____ (9:01) in which case Qwest is not responsible for any undelivered calls and this counterclaim should be denied. However, it does appear that Sprint did engage in call blocking be deliberately routing traffic to under capacity trunks without providing ___ (8:44). We have been asked to consider civil penalties for this action. Iowa code 476.51 requires the Board to provide the utility with written notice of a specific violation and gives us authority to levy civil penalties for subsequent violations. We should find that Sprint blocked calls associated with conference traffic and provide written notice to Sprint of the violation including notice that it would be subject to civil penalties for future violations.

BOARD MEMBER HANSEN: I concur.

BOARD MEMBER TANNER: I concur.

?: The next counterclaim is whether Qwest engaged in unlawful discrimination by making payments to some but not all of its customers. This counterclaim is based on the fact that Qwest sometimes pays volume based commissions to sales agents. The Board has previously held that revenue sharing is not inherently unreasonable so this counterclaim is unavailing. Moreover, Qwest is paying these commissions to sales agents, which is not at all similar to sharing revenues with a customer. Qwest _____ (7:35). Qwest's practices in this area simply are not relevant to the case.

BOARD MEMBER TANNER: I agree.

BOARD MEMBER HANSEN: I agree.

?: And finally, did Qwest discriminate against its wholesale carrier-customers by offering them unequal discounts. Reasnor argues that Qwest is engaged in unlawful discrimination by offering service discounts to wholesale customers. Again, that situation is not comparable to Respondents' activities in this case. Qwest is offering discounts in a competitive market that is deregulated and de-tariffed. Reasnor also argues that Qwest wholesale rates are in violation of the prohibition of geographic deaveraging but the prohibition applies to regional rates, not wholesale. Finally, Reasnor's claims that Qwest is somehow providing ____ (6:52) discount to ____ (6:49) was raised too late for this proceeding and will not be considered.

BOARD MEMBER HANSEN: I agree with all of this.

BOARD MEMBER TANNER: I do as well.

?: Any comments or questions for Staff? Any further comments or ____ (6:32)? At this time this concludes the decision meeting and ______ (6:27).

EXHIBIT 2

IUB Order Initiating Rulemaking
Docket No. RMU 2009-0009
(Sept. 18, 2009)

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: HIGH VOLUME ACCESS SERVICE [199 IAC 22]	DOCKET NO. RMU-2009-0009

ORDER INITIATING RULE MAKING

(Issued September 18, 2009)

In this order, the Utilities Board (Board) initiates a rule making proceeding to consider proposed amendments to its rules to address High Volume Access Service (HVAS) and the effect HVAS can have on a local exchange carrier's (LEC's) revenues from intrastate switched access services.[1] In particular, this proceeding is focused on situations in which a LEC's rates for intrastate access services are based, indirectly, on relatively low traffic volumes, but the LEC then experiences a relatively large and rapid increase in those volumes, resulting in a substantial increase in revenues without a matching increase in the total cost of providing access service. This can happen, for example, as a result of adding a HVAS customer that offers conference bridges, chat lines, help desks, or other services that are based upon high volumes of incoming or outgoing interexchange calls. The result is an increase in the LEC's access service minutes, which leads in turn to a matching increase in

[1] Intrastate access services are services of telephone utilities that provide the capability to deliver intrastate telecommunications services which originate with end users to interexchange carriers (IXCs) and the capability to deliver intrastate telecommunications services from IXCs to end users. 199 IAC 22.1(3).

the amount the LEC bills to interexchange carriers (IXCs) for switched access services. When this situation is actively pursued by the LEC, it is sometimes referred to as "access stimulation."

The Federal Communications Commission has described access stimulation and the economic incentives for it under the federal system of rate regulation as follows:

> Oversimplifying somewhat, to establish their rates, rate-of-return carriers calculate a revenue requirement, which is intended to recover expenses plus a reasonable rate of return. Once the revenue requirement is determined, carriers propose prices for all interstate services, which, when multiplied by historical or projected demand, are targeted to equal the revenue requirement. If, after rates are set, actual demand and expenses differ from the estimated demand and expenses, the realized rate-of-return may be greater or less than the targeted rate of return. The limited information we have suggests that, in certain instances, some LECs are experiencing dramatic increases in demand for switched access services. If the average cost per minute falls as demand grows, the realized rates of return are likely to exceed the authorized rate of return and thus the tariffed rates become unjust and unreasonable at some point. It is well established that there is a large fixed cost to purchasing a local switch and that the marginal or incremental cost of increasing the capacity of a local switch is low (some contend that it is zero) and certainly less than the average cost per minute of the local switch. Thus, if the average revenue per minute remains constant as demand grows, but the average cost per minute falls (which occurs if the marginal cost per minute is less than the average cost per minute) then profits (or return) will rise. This principle is equally applicable to all LECs. Moreover, the cost of local switching increases incrementally, while the price for local switching is established based on average costs, which are significantly higher. As a result, most of the switch costs are recovered by the demand used to establish the local

> switching rate. Carriers offering tandem switching services would experience a similar effect for their tandem switching costs. Accordingly, when local switching demand increases significantly, a carrier's increased revenues generally will exceed any cost increases. As a result, a carriers' rate of return at some point is likely to exceed the maximum allowed rate of return, making the rates unjust and unreasonable.
>
> A similar effect to that associated with local switching would also occur in the transport segment of the exchange access network. As demand increases, the number of circuits needed for transmission will increase. Again, the incremental cost is lower than the average cost (although the disparity is likely not as great as in the local switching case), which would lead to the rates for transport becoming unreasonable at some point as demand increases.

In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, "Notice of Proposed Rulemaking" at ¶¶ 14-15 (FCC October 2, 2007) (hereinafter the FCC Notice).

The system in Iowa is slightly different because the Board does not have rate regulation jurisdiction over a LEC's intrastate access charges to the same extent as the FCC has over interstate access charges. Iowa Code § 476.11 gives the Board jurisdiction over the terms and procedures under which toll (or interexchange) communications are interchanged, but only after a written complaint is filed by one of the telephone companies involved. This complaint-based jurisdiction means the Board is unable to order individual LECs to file new tariffs for switched access service rates on its own initiative, as the FCC has proposed to do in the FCC Notice. Thus, while the Board is aware of the FCC Notice and has given it consideration when preparing this order, the Board is not proposing to adopt the same type of rules that the FCC has described.

Even in a reduced-regulation environment, the cost of filing an individual intrastate access service tariff for each LEC can be substantial. This is particularly important when those costs are being spread over a fairly small customer base, resulting in a relatively large cost per customer. In order to reduce that burden, the Board has adopted rules that allow associations of local exchange utilities to file intrastate access service tariffs. Non-rate-regulated local exchange utilities may then concur in the association tariff. See 199 IAC 22.14(2)(b)(1). Most small LECs have opted into the association tariff filed with the Board by the Iowa Telecommunications Association (ITA). The access rates contained in ITA's intrastate tariff have generally mirrored interstate rates filed by the National Exchange Carrier Association (NECA) with the FCC. However, when NECA began the process of reducing some of its interstate rates, ITA elected not to adopt the reduced rates in its intrastate tariff.

In July of 2007, several IXCs filed objections to rate changes proposed by ITA for its intrastate access tariff. After holding formal contested case proceedings on the proposed changes, the Board ordered certain of the rates in ITA's intrastate tariff to be set at the same level as NECA's current rates for those elements.[2] Those rates in ITA's intrastate tariff continue to be based on the NECA rates, which are supported

[2] In re: Iowa Telecommunications Association, Docket Nos. TF-07-125, TF-07-139, "Final Order" (IUB May 30, 2008).

by interstate costs. This has been a cost-effective method of setting intrastate rates in the ITA tariff, but it did not allow for the possible effect of HVAS.

All elements of association tariffs are subject to Board review and approval, pursuant to 199 IAC 22.14(2)(b)(2). These rules give the Board jurisdiction to address the HVAS situation as it arises under an association tariff. Because HVAS situations tend to be fact-sensitive and individualized, the Board is tentatively concluding that HVAS calls cannot be billed for access services pursuant to an association tariff. Under the proposed rules, any LEC providing HVAS must file an individual tariff for that service (although it may continue to concur in an association tariff for all other access services).

To the extent an individual LEC opts to file an individual tariff for intrastate access services, either HVAS only or for all such services, the Board's rate jurisdiction is limited to the circumstances specified in § 476.11. Even for those situations, however, the Board proposes to adopt rules setting out the standards by which it will rule on the reasonableness of an individual LEC tariff if a complaint is filed pursuant to § 476.11. To that end, the proposed rules specify certain procedures that will be required in order to ensure reasonable HVAS access rates.

In Item 1 of the proposed rules, the Board proposes to include a new definition in 199 IAC 22.1(3) for high volume access services, based upon the effect a single customer, or group of similar customers, may have on a LEC's total access billings in a specified time frame. The proposal is that if a LEC's total access billings increase, or are expected to increase, by more than 100 percent in less than six months, there will be a presumption that an HVAS situation exists. The Board invites comment on whether this is an appropriate mechanism to identify HVAS situations and whether the proposed numerical thresholds are appropriate. The intent is to identify situations that represent a true HVAS without also including normal variations in access billings or typical levels of growth in access services.

Item 2 of the proposed rules is addressed to association tariffs and requires that such tariffs prohibit the application of association tariff rates to HVAS.

In Item 3, the Board proposes a new rule 22.14(2)"e" that would require LECs that are adding a new HVAS customer, or otherwise expecting or experiencing an HVAS situation, to notify the relevant IXCs of the telephone numbers involved and, for new customers, the expected date the HVAS service will be initiated. This will allow the IXCs to commence negotiations with the LEC regarding the terms and procedures for exchange of the HVAS toll traffic, with the possibility of seeking a Board resolution pursuant to Iowa Code § 476.11, if necessary. If the parties are able to negotiate new tariff provisions for HVAS, then this notice and negotiation period may also provide time for filing the agreed-upon tariff with the Board, prior to initiation of service. This timing is important; the LEC will have no access rate to apply to HVAS until its individual HVAS tariff is accepted for filing and has become effective.

The proposed rule also provides that if the Board has to resolve the matter in § 476.11 proceedings, the access rates for toll traffic to the HVAS numbers may be based on the incremental cost of providing the service, not including any marketing or other payments made to the HVAS customer. In order to accommodate the potential uncertainty associated with projected HVAS traffic volumes, the rule allows for the use of rate bands that will vary with different traffic levels, presumably with lower rates for higher volumes of HVAS traffic.

Item 4 is a proposed amendment to rule 22.20(5) that would allow the Board to revoke a LEC's certificate of public convenience and necessity, issued pursuant to Iowa Code § 476.29, for failure to address an HVAS situation as required by Board rules. This would be in addition to any other remedies or penalties available to the Board in a particular proceeding, such as civil penalties. The Board does not intend to revoke a LEC's certificate for a failure to properly forecast unexpected growth in access billings, but a LEC that is adding a conference calling customer or a customer offering help desk services, for example, and fails to notify the IXCs as required by the rules may find its certificate at risk.

The proposed amendments will be published in the October 7, 2009, Iowa Administrative Bulletin and comments on the proposed amendments will be due on or before October 27, 2009. An oral presentation is scheduled for 9 a.m. on December 8, 2009, in the Board's hearing room. The official version of the proposed amendments will be in the Iowa Administrative Bulletin and may contain editorial changes made by the Code Editor.

IT IS THEREFORE ORDERED:

1. A rule making proceeding identified as Docket No. RMU-2009-0009 is commenced for the purpose of receiving comments on the proposed amendments in the notice attached hereto and incorporated herein by reference in this order.

2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin a notice in the form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 18th day of September, 2009.

UTILITIES DIVISION [199]

Notice of Intended Action

Pursuant to the authority of Iowa Code sections 17A.4, 476.1, and 476.2, and Chapter 478, the Utilities Board (Board) gives notice that on September 18, 2009, the Board issued an order in Docket No. RMU-2009-0009, In re: High Volume Access Service [199 IAC 22], "Order Commencing Rule Making," that proposes amendments to the Board's rules regarding switched access service provided by local exchange carriers. The Board is proposing amendments to these rules based upon the facts established in re: Qwest Communications Corp. v. Superior Telephone Cooperative, et al., Docket No. FCU-07-2. The order commencing this rule making and containing the background and support for this proceeding can be found on the Board's Web site, www.state.ia.us/iub.

Pursuant to Iowa Code sections 17A.4(1)"a" and "b," any interested person may file a written statement of position pertaining to the proposed amendments. The statement must be filed on or before October 27, 2009. The statement should be filed electronically through the Board's Electronic Filing System (EFS). Instructions for making an electronic filing can be found on the EFS Web site at http://efs.iowa.gov. Any person who does not have access to the Internet may file comments on paper pursuant to 199 IAC 14.4(5). An original and ten copies of paper comments shall be filed. Both electronic and written filings shall comply with the format requirements in 199 IAC 2.2(2) and clearly state the author's name and address and make specific reference to this docket. All paper communications should be directed to the Executive Secretary, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa 50319-0069.

An oral presentation to receive oral comments on the proposed amendments will be held at 9 a.m. on December 8, 2009, in the Board's hearing room at the address listed above. Persons with disabilities who require assistive services or devices to observe or participate should contact the Utilities Board at (515) 281-5256 at least five days in advance of the scheduled date to request that appropriate arrangements be made.

These amendments are intended to implement Iowa Code sections 17A.4, 476.1, 476.2, 476.4, 476.5, 476.11, and 476.95.

The following amendments are proposed.

Item 1. Amend subrule 22.1(3) by inserting the following definition in alphabetical order:

"High Volume Access Services" (HVAS) is any service that results in an increase in total billings for intrastate exchange access for a local exchange utility in excess of 100 percent in less than six months. By way of illustration and not limitation, HVAS typically results in significant increases in interexchange call volumes and can include chat lines, conference bridges, call center operations, help desk provisioning, or similar operations. These services may be advertised to consumers as being free or for the cost of a long distance call. The call service operators often provide marketing activities for HVAS in exchange for direct payments, revenue sharing, concessions, or commissions from local service providers.

Item 2. Amend paragraph **22.14(2)"d"** and insert the following **new** subparagraph:

(8) A provision prohibiting the application of association access service rates to HVAS traffic.

Item 3. Amend subrule **22.14(2)** and insert the following **new** paragraph:

e. A local exchange utility that is adding a new HVAS customer or otherwise reasonably anticipates an HVAS situation shall notify interexchange utilities of the situation, the telephone numbers that will be assigned to the HVAS customer (if applicable), and the expected date service to the HVAS customer will be initiated, if applicable. Notice should be sent to each interexchange utility that paid for intrastate access services from the local exchange carrier in the preceding 12 months, by a method calculated to provide adequate notice. Any interexchange utility may request negotiations concerning the access rates applicable to calls to or from the HVAS customer.

A local exchange utility that experiences an increase in intrastate access billings that qualifies as an HVAS situation, but did not add a new HVAS customer or otherwise anticipate the situation, shall notify interexchange utilities of the HVAS situation at the earliest reasonable opportunity, as described in the preceding paragraph. Any interexchange utility may request negotiations concerning whether the local exchange utility's access rates, as a whole or for HVAS services only, should be changed to reflect the increased access traffic.

When a utility requests negotiations concerning intrastate access services, the parties shall negotiate in good faith to achieve reasonable terms and procedures for the exchange of traffic. No access charges shall apply to the HVAS traffic until an access tariff for HVAS is accepted for filing by the board and has become effective. At any time that any party believes negotiations will not be successful, any party may file a written complaint with the Board pursuant to section 476.11. In any such proceeding, the Board will consider setting the rate for access services for HVAS traffic based upon the incremental cost of providing HVAS service, although any other relevant evidence may also be considered. The incremental cost will not include marketing or other payments made to HVAS customers. The resulting rates for access services may include a range of rates based upon the volume of access traffic or other relevant factors.

Item 4. Amend subrule 22.20(5) as follows.

22.20(5) Certificate revocation. Any five subscribers or potential subscribers, an interexchange utility, or consumer advocate upon filing a sworn statement showing a generalized pattern of inadequate telephone service or facilities may petition the board to begin formal certificate revocation proceedings against a local exchange utility. For the purposes of this rule, inadequate telephone service or facilities may include the failure to treat high-volume access access (HVAS) charges in a manner consistent with the requirements of 199—22.14(2)"e"(476). While similar in nature to a complaint filed under rule 199—6.2(476), a petition under this rule shall be addressed by the board under the following procedure and not the procedure found in 199—Chapter 6.

September 18, 2009

/s/ Robert B. Berntsen
Robert B. Berntsen
Chair